Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2109

In the Supreme Court of the United States

OCTOBER TERM, 1980

EMMETT M. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bell v. *Hood*, 327 U.S. 678 3

Califano v. *Aznavorian*, 439 U.S. 170 4

Califano v. *Boles*, 443 U.S. 282 4

Hagans v. *Lavine*, 415 U.S. 528 3

Schweiker v. *Wilson*, No. 79-1380 (Mar. 4, 1981) 3

United States Railroad Retirement Board v. *Fritz*, No. 79-870 (Dec. 9, 1980) 3-4

Constitution and statutes:

United States Constitution, Fifth Amendment 1, 2

5 U.S.C. 8340 ..... 1, 3

28 U.S.C. 1491 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2109

EMMETT M. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners receive railroad retirement, private, or state pensions. They contend that 5 U.S.C. 8340, which provides that persons receiving federal civil service pensions are entitled to regular cost-of-living increases, is unconstitutional because it does not provide similar cost-of-living increases for private and state pensioners. They seek review of the decision of the Court of Claims that it lacks jurisdiction of this case.

1. *a.* Petitioners first filed suit in the United States District Court for the Northern District of Illinois, alleging that 5 U.S.C. 8340 violates the equal protection requirements of the Due Process Clause of the Fifth Amendment because the statute distinguishes between persons receiving federal civil service pensions and those receiving other kinds of pensions. They argued that it is unfair for the United States

to provide cost-of-living adjustments for its former employees and deny such adjustments to people receiving other kinds of pensions, but who suffer from the effects of inflation. Petitioners sought declaratory relief and an order requiring the United States to pay them retroactively and for the future such additional monthly amounts as may be required to give them cost-of-living indexing rights equivalent to those of federal civil service retirees. See Pet. App. 2.

The district court rejected petitioners' equal protection claim on the merits. *Clark* v. *United States*, 447 F. Supp. 172, 177-178 (N.D.Ill. 1978), vacated, 596 F. 2d 252 (7th Cir. 1979). Since the challenged statute created no suspect classification, the only question was whether the statutory classification was irrational. The court concluded that "[i]t simply makes no sense to urge" that the distinction between former government employees and others is irrational. 447 F. Supp. at 178.

On appeal, the Seventh Circuit vacated the judgment and remanded the case to the district court, with directions to transfer the case to the Court of Claims. 596 F. 2d 252. In the view of the court of appeals, petitioners sought money rather than injunctive relief, and therefore only the Court of Claims had jurisdiction of the claim.

b. The Court of Claims held that petitioners' claim was not "founded * * * upon the Constitution" within the meaning of 28 U.S.C. 1491 since the claim was based on the equal protection component of the Fifth Amendment, which does not require the government to pay money damages (Pet. App. 4-5). The court, therefore, dismissed the case for lack of jurisdiction.

2. The apparent conflict between the Seventh Circuit and the Court of Claims concerning the scope of 28 U.S.C. 1491 may eventually require resolution in this Court. This is

not an appropriate case for doing so.[1] Petitioners' claim is so plainly insubstantial that it would have been proper for either the court of appeals or the Court of Claims to dismiss it for lack of jurisdiction on that ground. See, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528, 536-543 (1974); *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946).

Petitioners assert that the United States may not constitutionally adjust the pensions that it pays its retired employees to compensate for inflation unless it also makes payments out of the treasury to those like petitioners who receive private or state pensions. Petitioners are not similarly situated to federal civil service retirees:

> Regarding conditions of employment, including pension benefits, federal employees are in a class separate from other citizens. The United States as their employer has special obligations to them alone. In determining those conditions of employment, the United States, like all other employers, including those of [petitioners], is acting in a proprietary capacity. The fact that [petitioners] happen to be pensioners, therefore, does not constitute a basis for maintaining that they are entitled to the same benefits provided by the federal government to its retired employees.

Clark v. *United States, supra*, 447 F. Supp. at 177-178. The distinction recognized in Section 8340 between former federal employees and petitioners is, therefore, perfectly reasonable and plainly does not violate the equal protection component of the Fifth Amendment. *E.g.*, *Schweiker* v. *Wilson*, No. 79-1380 (Mar. 4, 1981), slip op. 16-18; *United States Railroad Retirement Board* v. *Fritz*, No. 79-870

---

[1]The conflict may, of course, resolve itself. There is no reason to assume that the Seventh Circuit will persist in its view that the Court of Claims has jurisdiction in this case in light of the Court of Claims' ruling on the question.

(Dec. 9, 1980), slip op. 11-12; *Califano* v. *Boles*, 443 U.S. 282, 293 (1979); *Califano* v. *Aznavorian*, 439 U.S. 170, 174-175 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

DOJ-1981-08